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NO. 87-377

In the Supreme Court of the United States

OCTOBER TERM, 1987

ELISE D. MCINTOSH, ET AL., CROSS-PETITIONERS

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CROSS-PETIONERS' REPLY MEMORANDUM

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In brief reply, petitioners reject the argument that *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986), *petition for cert. pending*, No. 86-1813, presents substantially the same issue as that in *Turner v. McIntosh, petition for cert. pending*, No. 87-174. In *Kotarski*, the rights of a probationary employee are involved, while in *Turner v. McIntosh*, the rights of career service employees with vested interests are asserted.

Secondly, it is important that the cross-petition here be accepted if certiorari is granted in *Turner v. McIntosh*, since the

petitioner in *Turner* is claiming that petitioners here had a Title VII remedy as an administrative remedy. If the Court accepts that view, but has rejected certiorari here, then petitioners will have lost all relief, although a jury found that petitioners suffered such intentional and wrongful acts at the hands of a government employee as to warrant punitive damages. Denial of certiorari here would accomplish that which the government wants, to foreclose the alternative of Title VII relief and to then hope that this Court will find that a *Bivens* action is unavailable.

Finally, respondents have raised the technical argument that Weinberger and Marsh, the nominal defendants in the Title VII case pursuant to 42 U.S.C. §2000e-16(c), were not defendants in *Turner v. McIntosh*, and that collateral estoppel is therefore inapplicable. This is a new claim that was never raised below, and it has therefore been waived. Moreover, a review of the record would show that the agency's and Turner's conduct in connection with these promotion actions was part of a single set of facts, and was treated as such by both the trial court and the parties below. In the trial of the Title VII claims, the trial court considered the evidence previously adduced in the class action hearing and the *Turner* trial, and refused to allow the repetition of evidence. Counsel for defendants was the same throughout the trial of these matters, and the same witnesses appeared in both cases. To argue that the *Turner* case had different facts should be an embarrassment to respondents, for it shows an absence of knowledge of the record.

It is submitted that the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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